IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 208

GLADYS HILDRETH,
Petitioner,

vs.

UNION NEWS COMPANY, a New York corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Gladys Hildreth, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on April 12, 1963.

OPINIONS BELOW

The judgment of the district court (11a-22a) granting defendant's motion for a directed verdict of no cause of action is unreported. The opinion of the Court of Appeals is reported in 315 F. 2d 548 (1963), and a copy is appended hereto (Appendix A, 1a).

The opinion of the Court of Appeals, on the first appeal, is reported in 295 F. 2d 658 (1961), and a copy is appended hereto (Appendix A, 4a). Order on petition for rehearing entered November 9, 1961.

JURISDICTION

The judgment of the Court of Appeals is dated April 12, 1963 and was entered on the same date. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

I. Is a litigant deprived of Constitutional rights to trial by jury and due process of law, by the action of a Court of Appeals in setting aside a verdict and judgment in favor of such litigant, and ordering a new trial, where the appellate court's conclusions of law are based on findings of fact contrary to all the evidence?

II. On retrial, is the doctrine of the law of the case applicable where the opinion of the Court of Appeals is entirely based on claims not advanced by either of the parties and important findings of fact by it which are contrary to the admitted and undisputed facts before the jury in both trials?

III. Did the Court of Appeals err in holding that there was "no evidence from which a jury could find that in agreeing to lay off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the union's and defendant's agents"?

IV. Where a union makes a secret agreement with an employer that it will not object if the employer discharges five employees without justification, although the existing collective bargaining agreement provides employees may not be discharged without just cause, and after the discharges refuses to either inform the employees of the reasons therefore or to require the employer to do so, refuses without explanation to process a grievance in behalf of such employees, fails to follow up with the employer to determine whether conditions which might lead to reinstatement of the employees exist and participates in a sham hearing with reference to the discharge, did the Court of Appeals err in holding that what was done by the union and defendant after plaintiff's discharge could not

be relied upon as evidence of fraud, bad faith or collusion in the prior agreement to terminate plaintiff's employment?

V. Does a union have the power, under guise of interpreting or modifying an existing collective bargaining agreement, to destroy an employee's right not to be discharged excepting for just cause?

VI. Where, according to the terms of the collective bargaining agreement, the contractual remedies for the adjustment of grievances may be invoked only by the union, is a wrongfully discharged employee entitled to personally present a grievance over such discharge to the company; and, if not, is failure of the union to exhaust contractual remedies a defense to a civil action for damages?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (U. S. C. A., *Constitution*, p. 134).

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

. . . .

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives

of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *" 61 *Stat.*, 140, 143, 29 U. S. C. (Supp. V) Secs. 157, 159 (a).

STATEMENT

Jurisdiction of the trial court is based on diversity of citizenship. The action was brought to recover damages for violation of seniority rights and for wrongful discharge in breach of the provisions of a collective bargaining agreement (6a-7a). By way of defense, defendant advanced the claims that: (1) plaintiff failed to exhaust the grievance procedure provided by the collective bargaining agreement; (2) that plaintiff was, personally or as a member of a crew, guilty of carelessness, inefficiency or malfeasance, which resulted in financial loss to defendant; (3) that plaintiff's collective bargaining agent acquiesced in her discharge; and (4) that plaintiff failed to mitigate damages (9a-10a). The case was tried to a jury in January, 1960. A motion for a directed verdict was made by the defendant at the close of the proofs, which was denied. The jury returned a verdict of $5,000.00 in favor of the plaintiff and against the defendant and judgment was entered thereon on January 28, 1960. No motion for judgment n.o.v. or for a new trial was made after entry of judgment. An appeal was taken to the Court of Appeals for the Sixth Circuit, *which re-examined and re-decided the facts* and, on the basis of such decision, directed entry of judgment for defendant. Following the filing of a petition for rehearing, the Court of Appeals for the Sixth Circuit remanded the case for a new trial, citing *Cone vs. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849.

Upon retrial of the cause certain evidence, additional to that adduced at the first trial, was introduced. Nonetheless, the trial court held that the evidence introduced was substantially the same as that offered on the first trial of the cause and, this being so, it was bound by the determination of the Court of Appeals that there was no evidence to go to the jury on the issue of fraud, bad faith, or collusion between the union and the defendant (16a); that the union

had the power to waive plaintiff's right not to be discharged except for just cause (17a); and that under this collective bargaining agreement the plaintiff had no right to present and process a grievance protesting her discharge, this right being exclusively reserved to the union (19a-20a).

The evidence in this case is largely undisputed and such minor variations as exist are basically immaterial. Plaintiff commenced work as a counter girl, at a soda fountain operated by defendant at the Michigan Central Depot in Detroit, in September, 1948 and continued in such employment until March 11, 1958. During the period of her employment, she was a member of the Hotel & Restaurant Workers union and various collective bargaining agreements were in effect between said union and defendant — the relevant one being dated October 15, 1957. This contract recognized the seniority rights of employees and provided an employee should not be discharged except for just cause (94a).

In the late spring of 1957, George Hloros was named manager of the soda fountain, bar and restaurant at the Depot by the Union News Company. Although no complaints were made by corporate headquarters (72a), Hloros and his immediate supervisor, Carl Omar, decided the cost of food in relation to sales was too high and, around May or June of 1957, began complaining to the union representative about it; and asking that the union approve a change of crew as a solution to their problem (34a). The union refused to accede to this request at first. The theory behind the request was that the counter employees were either embezzling cash, failing to charge proper prices particularly to friends, giving too large portions of food or otherwise mishandling food or money (42a).

Conversations about the "bad operation" continued between the company and the union until about February, 1958, when the company claimed they had a particularly bad showing and offered to open their books to the union to prove it. The union looked at the books, or at least at the company's Form 292 (a sample sheet of which appears as Exhibit A, 98a) and agreed that it showed a high ratio of food costs to sales. There is no question but that these reports were made out monthly during 1957 and 1958, and

the figures therefrom which the company claims are relevant are summarized on pages 101a through 104a, showing a range of percentage of food costs to sales of from 34.09 per cent for December, 1958 to 44.73 per cent for May, 1957. Plaintiff does not question the accuracy of any of the books submitted but objected to their admission on the ground that they were conclusions, being summaries and the underlying records not produced for examination (36a); on the ground of relevancy (38a); on the ground that the form 133 (97a) was hearsay, being merely the record of a transaction with a third party (39a); and because they included figures for the small soda fountain, whereas plaintiff was employed only at the large fountain (39a, 41a). The court overruled these objections and admitted them.

At the end of February, or the first of March, 1958, the union entered into an agreement with the company that the company could lay off five of the ten counter employees. Which ones were to be laid off was left entirely up to the company, and the union never tried to learn why the company picked the five it did. Following the lay-off, if the company's figures did not improve within the next two weeks, the employees were to be rehired and paid their two weeks wages (35a).

At the time of making this agreement, both the company and the union were aware that the counter employees might not be the source of the alleged difficulty. It could have been due to theft by any of the other employees connected with the operation. The office girl could have been embezzling funds after they were turned in from the counter cash registers (76a; 78a); there could have been pilferage from the stockroom (62a; 92a); or the apparent loss of profits might have been due to an increase in the cost of merchandise with no corresponding increase in selling price. The company knew that a variation in the percentage figures over a two week period has no significance (67a). Both the company and the union knew that, if any of the counter employees were guilty of carelessness or inefficiency which brought about an unprofitable operation, or indicated a failure to account for all receipts, waste of food or improper handling of food, such conduct could be readily observed and a detective (or any stranger) could

easily point out the culprit (63a; 72a-73a; 85a). In the summer of 1957, a fountain girl was discharged for not ringing up sales, when a cab driver reported to Hloros that she was failing to do so, and a check of her register showed he was right (79a). When the union suggested to the company that it use spotters to find out whether any counter employees were guilty of such conduct, the company claimed it was not its policy to do so (72a, 85a), this suggestion having been made before the discharge of plaintiff (63a). By using sales checks, the company could locate the source of its trouble (63a; 71a; 85a). With reference to whether the union acted in bad faith, collusively or arbitrarily in acquiescing in the discharge of the five employees, plaintiff showed that the union never told any of the employees of the complaints by the company during 1957 and 1958, or its demand that the union agree to the discharge of all the counter employees (57a); nor did the union insist that the company inform them of its complaints (57a; 60a-61a). The union did not insist that the company take any of the steps it could have, to correct the situation or place the blame for it, instead of discharging plaintiff and the other four (63a). Finally, the plaintiff testified that she never knew, until the first trial of the cause, what the company claimed as the reason for the discharges (23a-27a); and the union was unable to recall notifying the women of the reason or insisting that the company do so (58a-62a).[1]

Plaintiff was told at first that she was being laid off. She found out, the following Monday, that she was being replaced and promptly went to her union to seek its assistance in filing and processing a grievance. She talked to Wirtz, the union representative, who told her he didn't have time

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[1] The importance of the facts stated in this paragraph cannot be overemphasized. They are largely based on defendant's own testimony and wholly uncontradicated but they are diametrically opposed to the findings of fact made by the Court of Appeals on which it based its opinions. See 295 F. 2d p. 660, second column; p. 663, first column. 315 F. 2d p. 550, first column.

to be bothered, according to plaintiff's testimony (25a-26a), and he turned her over to his superior, Mr. Carruthers, according to Wirtz' testimony (65a). Carruthers arranged for a meeting with the company on March 24, at the Depot, in Mr. Omar's office. At this meeting, the women were told they were laid off "under Code 12" and the testimony is in conflict as to whether they were told they were being laid off for the good of the company. When plaintiff asked Wirtz, at this meeting, why he did not protect them, he replied that the union got the job for them and it was up to the employees to keep it (24a), but he did not know what she could have done to keep the job (62a).

Following this meeting, plaintiff made several attempts to persuade the union to present and process a grievance in respect to her wrongful discharge, without success (25a-29a). She then presented her grievance, herself, to the company under the provisions of 29 U. S. C. A. 159 (a). Correspondence between the company and plaintiff's attorney on the subject elicited only a firm response that the company would not deal with anyone on the grievance other than the union (Exhibits 2 through 9) and all proceedings must take place between it and the company in accordance with the grievance section of the collective bargaining agreement (94a).

The company has stated, at all times, that it knew of no conduct on the part of plaintiff or the other four women which warranted discharge (73a; 88a). The union did not know of any reason why plaintiff should be discharged (61a). Mr. Hloros was unable to remember what the union did about checking the books after the discharges took place, to see if there had been an improvement (73a).

The plaintiff put in evidence of her damages. The company put in evidence in support of its claim of failure to mitigate damages. The plaintiff countered with testimony as to her efforts to obtain employment.

Plaintiff never authorized the union to waive any rights or settle any claims she had against defendant (66a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of her right to trial by jury.
2. The Court of Appeals has decided a Federal question in conflict with the applicable decisions of this court.
3. The Court of Appeals has decided a matter of state law in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

ARGUMENT

1. The Court of Appeals has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of her right to trial by jury.

The Court of Appeals, at the very end of its opinion, states the issue in the case as being "whether, under the circumstances here involved, the Union had the authority, acting in the collective interest of those whom it represented, to agree with the defendant on necessary corrective measures to be taken without such action being treated as a breach of the collective bargaining agreement." At the outset, the Court of Appeals refers to its opinion on the first appeal for a complete statement of the facts and, referring to that opinion, we find that the Court of Appeals determined the circumstances involved were:

(a) The defendant was concerned about its cost experience on the counter operation where plaintiff worked;

(b) That a ratio of over 40 per cent of cost of food to sales indicated mishandling of merchandise and money by counter employees;

(c) Defendant was unable to ascertain which of, and how many of, its counter employees were guilty of the misconduct causing its bad experience;

(d) That the union and the company discussed the company's complaints for a period of several months prior to February, 1958;

(e) There was no proof directly connecting plaintiff, individually, with dishonesty, wrongdoing or malfeasance.

(f) There was no evidence from which a jury could find that, in agreeing to lay-off and then discharge plaintiff and her co-workers in an effort to solve defendant's problems, there was any fraud, bad faith or collusion on the part of, or between, the union's and defendant's agents.

It is clear that on the earlier trial of this cause, by returning a verdict of $5,000.00 in favor of the plaintiff, the jury must have made a different determination from that reached by the Court of Appeals. No mention is made of any errors of law with reference to instructions to the jury, or similar matters, and, as the Court of Appeals noted in its last opinion, "The basic facts, upon which we concluded that as a matter of law the plaintiff had no cause of action, are not in dispute."

It is petitioner's position that the Court of Appeals not only ignored the undisputed facts but misstated the facts in its opinion on the first appeal; that it refused to correct them when its attention was directed to the error on petition for rehearing; and again refused to correct them on the second appeal.

Taking first the Court of Appeals finding that defendant was unable to ascertain which of, and how many of, its counter employees were guilty of the misconduct causing its bad experience, we direct this court's attention to the following testimony by defendant's own restaurant managers on cross-examination:

"Q. Mr. Hloros, were you here when Mr. Wirtz testified that he suggested that you use a spotter to check the operation at the soda fountain?

A. Yes, I was.

Q. Do you recall a conversation with Mr. Wirtz on that subject?

A. No, I don't. I could have had.

Q. Could such spotters have detected mishandling of either food or cash?

A. Yes, they probably could have" (p. 71a).

"Q. Now, during the time that these girls were on vacation, did you hire somebody to replace them?

A. I can't say that. I can't remember who covered the vacations.

Q. Well, I'm not asking you who, I'm only asking if you brought somebody extra in to cover this shift?

A. I wouldn't say I did because we did have relief girls at the time. I can't say honestly who covered for their vacations. Whether I brought an outside girl or not.

Q. But you could have done so, could you not?

A. Yes, sure.

Q. And you could have brought a girl in with specific instructions to watch the operation and report any mishandling of cash or food, could you not?

A. Positively not. I didn't do it.

Q. But you could have?

A. Yes, I could have" (p. 72a).

• • •

Q. (To Mr. Omar): Now, if you issued so many hot dogs and so many buns —

A. Yes.

Q. — and you used sales checks —

A. We didn't use sale checks.

Q. But by using sales checks, you could account for those hot dogs?

A. Presumably if they were put on the check.

Q. But you could require your girls to make out checks if you were using them, couldn't you?

A. That's right.

Q. And when you issued 10 hot dogs, you had better get 10 checks back with 10 hot dogs on them, right?

A. Well, of course, they sometimes do it, got their limit. There might be one or two there.

Q. You can make them put it in a check for their lunch?

A. We could.

Q. So you could account for every one of them, can't you?

A. That's right.

Q. And within a narrow limit, you can account for all of the food that was sold, can't you?

A. That's right" (p. 84a-85a).

Next, it was conceded at all times, by both the union and the company, that the "bad operation" might not be due to any misconduct on the part of the counter employees. The union representative, Wirtz, testified that there were a great many factors that could account for an unfavorable ratio of food costs to sales, one being that anyone in the employ of the company could steal food (62a); the bookkeeper who received the money from the counter could have posted a false total for the amount of sales and pocketed the difference between that and the true amount (76a-78a). The dining room or restaurant, which constituted a separate bookkeeping operation, would borrow food from the soda fountain, without accounting for it (91a-92a). This was an ordinary company practice, but, obviously, it would inflate the cost of food charged to the soda fountain.

Finally, there was ample evidence from which the jury could have concluded either that there was; in fact, no "bad operation" or that the company had failed to prove one existed. The restaurant manager, Hloros, who first started complaining to the union about the operation, started work at the Michigan Central Depot around May of 1937 (34a). He did not know whether the desirable operating figure had ever been achieved at the Michigan Central Depot before he came (69a). The documentary evidence offered to prove that the operation was bad consisted of:

(a) Books in which were listed invoices from various suppliers (97a). The underlying invoices were never made available and, aside from the question of admissibility of such evidence in the absence of the underlying records, there was no way to ascertain

whether the variations in the ratio of costs to sales might have been due to variations in the unit price of the items purchased — for example, variations in the price of coffee per pound.

(b) Other books showing the sales reported, cost of merchandise less inventory, and inventory at the end of the month (98a). The sales reported figure was prepared from the cash register tapes, which were then thrown away, and there was no way of determining whether the totals were correctly transferred from the cash register tapes to this book (77a). Therefore, the total sales reported could be wrong and would be wrong if the bookkeeper was indulging in peculations. The inventory figure on this was a so-called "standing inventory" figure, by which the defendant meant they used the same figure for all months in between the dates on which actual physical inventories were taken (48a-50a). Thus, if the inventory were building up, the ratio of costs to sales would be reflected as unusually high. Even so, the actual physical inventories, although in the possession of the company, were never produced and, therefore, it was impossible to determine where the figure for the cost of food sold was correct, assuming that all other figures were correct. By the same token, if an inventory was built up and the company started using up inventory instead of purchasing, the cost of food sold to sales ratio would become much more favorable (70a; 83a-84a).

There was certain additional testimony by the defendant's managers to the effect that a change in the ratio of food costs to sales over a period of two weeks would not necessarily indicate an improvement in the efficiency or honesty of the counter operation and might reflect a change in the weather and nothing more (67a). The company claimed that all of its troubles originated at the large fountain (43a) but the records offered covered the purchases and sales at both the large and small fountain and some of the women laid off customarily worked at the

small fountain (44a). Finally their managers also testified that the restaurant operation was wholly satisfactory during the same period of time and that an acceptable ratio of food costs to sales for the restaurant operation was 38% to 41% (70a-71a). But, from March, 1957 through 1958, the cost of food to sales for the restaurant was over 41% for 14 of these 22 months, and over 44% for five of these months (96a). From these facts, the jury could well have decided the entire defense was a sham.

From the foregoing, it is clear that petitioner is not asking this Court to review conflicting claims or appraise the possible inferences that might be drawn from the facts. The two vital findings on which the Court of Appeals relied to justify the action of union in consenting to the discharge in violation of plaintiff's right not to be terminated without just cause (i.e. that the counter employees necessarily caused the bad showing and the company could not ascertain who was responsible) are admittedly and clearly contrary to all the evidence. For that matter, neither the company nor the union ever claimed that the company could not ascertain who was responsible for the bad operation, if there was one; only the Court of Appeals advanced this thought.

This being true, we simply have an employer who wishes to fire some employees but cannot do so without just cause under the collective bargaining agreement; and, with no justification for so doing, the union agrees that it will not process a grievance in their behalf or otherwise enforce the union contract — and the Court of Appeals holds it has no power to do so, and to bind the employees thereby, under its collective bargaining authority!

On the issue of good faith, the undisputed testimony showed that the union never discussed the company's complaints with the employees (57a) and did not insist that the company do so (58a). The union knew the company had not told the women the reason they were discharged (60a) and "wouldn't say for sure" that it had ever informed the discharged employees of the agreement with the company to lay them off for a trial period of two weeks, this layoff to ripen into discharge if the figures improved (62a). Plaintiff testified positively that she was not told of the reasons for the discharge (24a). The union repre-

sentative admitted that when the plaintiff asked him why she could not get any protection from him he told her "We get the job for you and it is entirely up to you to keep it" (24a; 62a) but he knew of nothing that plaintiff could have done to keep her job (62a). The union representative said that he knew that the company could determine the cause of its difficulties by the use of sales check or spotters (63a) and that the use of a standing inventory figure would distort the monthly ratio of cost of food to sales but made no inquiry about the extent of the inventory nor did he ask to see the inventory figures (58a). Further, Mr. Hloros indicated that the union never checked his figures after the firings to determine whether they had improved (73a) and the union never bothered to determine why the company chose the particular five that it did out of the ten for layoff (64a; 74a).

We recognize that the issue of good faith or arbitrary action on the part of a union sometimes rests upon inferences to be drawn by the jury from the facts, as a matter of law the union stands in a fiduciary relationship to the persons whom it represents and as collective bargaining agent owes them scrupulous good faith and candor. 2 *Am. Jur.*, Agency Sec. 252, p. 203. Further, it has been held that an agent has a duty of disclosure. As the Michigan Supreme Court said in *School District of Pontiac vs. Sachse*, 274 Mich. 345, 351:

> "The correct rule is stated in 1 *Mechem on Agency* (2d Ed.), Sec. 1207, with references, as follows:
>
> "'It is always the duty of an agent, * * * to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests. * * * But even where the agent is not personally interested in the contract, his duty to give the principal full information of all the material facts relating to the transaction, which are within his knowledge, still exists. * * *'"

It has also been said that:

"'There are certain well-defined duties and liabilities which the agent owes to the principal. The agent is a fiduciary and owes to his principal the duty of good faith and loyalty. The agent is under the duty to use care, skill, and diligence, and to obey the instructions of his principal.'" *Burton v. Burton*, 332 Mich. 326, 337.

"'A conscious and wilful neglect of duty, not prompted by any justifiable motive, must necessarily be committed in bad faith.'" *In re Hackett, Hoff & Thiermann*, 70 F. 2d 815, 817, C. A. 7. See also *Cornel v. Mason*, 268 P. 8, 12; 46 Ida. 712.

On the facts above stated, it follows as a matter of law that the union acted arbitrarily, and in bad faith.

The action of the Court of Appeals in re-examining the facts, reversing on the first appeal and remanding for a new trial, and then upholding the verdict directed solely on the basis of its previous opinion, comes within the orbit of conduct heretofore disapproved by this court in *Slocum vs. New York Life Insurance Co.*, 228 U. S. 364, 382, and *Baltimore & Carolina Line vs. Redman*, 55 S. Ct. 890, 295 U. S. 654, 657, 79 L. Ed. 1636.

In the latter case, this court said:

"The Seventh Amendment to the Constitution prescribes:

'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.'

"The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to

that end declares that 'no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.'

"The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the Court and issues of fact are to be determined by the jury under appropriate instructions by the Court."

We would also like to point out that there is a substantial question as to whether the trial court abdicated its function on the retrial of the cause by refusing to make an independent determination as to whether there was sufficient evidence to go to the jury.

At common law it was the duty of the trial court to determine in the first instance whether there was sufficient evidence to go to the jury. Under modern practice it does this by ruling on a motion for directed verdict or for judgment n.o.v. The District Court did so in the first trial of this cause. On the second trial, the District Court simply stated that, the evidence being substantially the same as that on the first trial, it must grant defendant's motion for directed verdict and refused to make an independent determination on the basis of testimony heard and witnesses observed. It is clear that the trial judge was proceeding under the doctrine of the law of the case — but the facts before the jury on the second trial, while substantially the same as goes on the first trial, *were not the facts found by the Court of Appeals.* In such a situation, we urge that the doctrine of the law of the case does not apply. We have found no authority on this subject but we do suggest such procedure comes perilously close to giving defendant not just ten days within which to make a motion for judgment n.o.v., or for a new trial, but approximately two years and, in addition, it permits a

usurpation of the function of the trial judge by the Court of Appeals. See *Cone vs. West Virginia Pulp & Paper Co.*, supra.

2. The Court of Appeals has decided a Federal question in conflict with the applicable decisions of this court.

The foregoing discussion has been on the theory that the union, as collective bargaining representative, in a proper case has the power to modify accrued rights of employees. In its opinion on the first appeal, the Court of Appeals indicates that this power has been recognized by this court in *Elgin, Joliet & Eastern Railway Co. vs. Burley*, 325 U. S. 711, 89 L. Ed. 1896. We respectfully urge that the Court of Appeals has misconceived the effect of its decision in the light of the Burley case. In the case before us, the union and the company agreed that employees could be discharged without just cause but, under Burley, any such agreement would be valid only insofar as it operated prospectively. While it is true that the union and the company agreed to the layoff before the layoff took place, nonetheless the discharge was predicated on events occurring prior to the so-called modification of the agreement.

This is completely at odds with the observation of this court that the collective bargaining powers of statutory bargaining agents does not extend to the changing of existing agreements with retroactive effects upon accrued rights or claims. *Elgin, Joliet & Eastern Railway Co. vs. Burley, supra*, pp. 739-40. Whatever might be said of the agreement if the company and the union had agreed that from February 15, 1957 on the company would be entitled to discharge at will in any month in which its ratio of cost of sales to sales exceeded 40%, this is not the situation that we have before us and the plaintiff's discharge without recourse violates all fundamental concepts of fair play.

Inferentially, at least, the Court of Appeals must be found to have held that such an agreement, operating retroactively, precluded any protest on the part of the employees affected either by way of grievance processing, under the rights bestowed by 29 *U. S. C. A.* 159(a) or by

way of civil suit. In support of this determination, it cited *Cortez vs. Ford Motor Co.*, 349 Mich. 108, to the effect that:

> "'Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the Union, subject to challange after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud.'"

In citing this Michigan case, however, the Court of Appeals failed to note that the Cortez case is in many aspects contrary to the holding of this court in *Elgin, Joliet & Eastern Railway Co. vs. Burley, supra*, and the court also failed to indicate how the agreement of the union in the instant cause could possibly be in the interest of all its members or any of them; all this, of course; without getting into the question of whether the union did act in good faith and not arbitrarily.

3. The Court of Appeals has decided a matter of state law in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

The Michigan Supreme Court has explicitly held that the reasons for discharge must be personal to the employee discharged. In other words, the fact that something is wrong somewhere is not sufficient unless it is shown the named employee is responsible. Want of diligence on the part of an employee may not be inferred merely because the business disappoints the employer's expectations. *Coon vs. Floyd Knox, Inc.*, 296 Mich. 305, 309. The words in a recent Michigan decision are directly applicable to plaintiff's case:

> "We can but conclude that the record obviously does not contain substantial, material and competent evidence of wrongdoing on the part of appellant. The most that could be said is that the record contains suspicions, insinuations, and unsubstantiated accusations. Any dismissal order based upon this record would

> offend not only the concepts of fair play, but shock the conscience of anyone who would take the time to read the record on which the order was based." *Dillon vs. Lapeer Training School*, 364 Mich. 1, 21-22.

This being so, we sumit that with the best intentions in the world the union was without the power to consent to the plaintiff's discharge without just cause and, in upholding its action in so doing, the Court of Appeals deprived the plaintiff of that protection to which she was entitled under the law of the state in which she resided and the defendant did business. When a union approves a discharge under circumstances which would compel the courts of Michigan to disapprove it, we think this does not prove the superior power or wisdom of the union but, on the contrary, is strongly indicative of bad faith and arbitrary action.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorney for Petitioner.

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